Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1181

LUIS HERNANDEZ,

Petitioner

v.

STATE OF FLORIDA,

Respondent

PETITIONER'S REPLY MEMORANDUM

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The Brief of Respondent in Opposition ("Resp. Brief") makes several mistaken or misleading assertions to which a short reply is warranted. In addition, petitioner takes this opportunity to inform the Court of recent lower court opinions which illustrate the need for guidance to those courts and which support the granting of a writ of certiorari in this case.

1. This is not a "plain view" case.

Respondent asserts that because one officer observed "what he believed to be marijuana" and noted the smell of hay or dried grass, there was probable cause "to support the seizure of the bales prior to the slitting of the one bale, based on plain view." Resp. Brief at 11. This is

a distortion of both the facts[1] and the law. The officer testified that prior to opening the truck he did not see or smell any contraband (R. 67, 70) and that on opening the truck, what he saw was "large bales of an unknown substance * * * that was loaded or packaged in an opaque-type material and also bound by burlap or canvas." R. 39.[2]

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[1] Respondent accepts the statements of facts set forth by petitioners, as supplemented by the opinion of the District Court of Appeal of Florida, Third District. Resp. Brief at 2, 5. While we believe that the facts in this case are not disputed, the statement of those facts in the lower court's opinion is abbreviated and subject to misinterpretation.

For example, a quick reading of the facts as quoted by respondent from the opinion of the lower court might lead one to believe that the officer saw unbaled marijuana in addition to seeing opaquely-wrapped bales. The evidence is otherwise. *See* n. 2, *infra*.

[2] On cross-examination, the officer testified as follows:

Q. So you are saying, at the edge of the door, you don't smell anything at that time; do you?

A. No.

Q. You don't know what is contained in the truck?

A. No.

Q. You can't see any contraband anywhere around, can you?

A. Not in plain view, no.

Q. And you don't have X-ray vision?

A. No.

Q. You don't see any contraband of any sort on the boat—

A. No, from where I am standing.

Q. (Continuing)—or on the grounds, at all, on the boat or truck?

A. No.

Q. You then opened the door?

A. That's correct.

Q. Upon opening the door, you observed several bales; is that correct?

[Footnote continued on page 3]

Opaquely-wrapped marijuana is not subject to "plain sight seizure," as respondent well knows, since the very same issue was litigated unsuccessfully by the State of Florida in a case decided by the Third District Court of Appeal of Florida less than one year ago. In *Pomerantz* v. *State*, 372 So.2d 104 (1979), the state argued that opening and seizing the contents of two black plastic bags was "a valid plain sight seizure of contraband which excused the necessity of obtaining a search warrant * * * ." *Id.* at 110. The court reviewed the applicable law and held that since "[i]t was necessary for the offi-

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[2] [Continued]

A. I observed a large truck, approximately two-thirds full of large bales.

Q. Isn't it a fact that even at the point after you raised the door and looked in, and you saw the bales, even at that point, you didn't know what, if anything, those bales contained; did you?

MR. GILBERT: Objection.

THE COURT: Overruled.

THE WITNESS: I had an idea, a real good idea of what they contained.

BY MR. KENNEDY:

Q. But you didn't know, did you?

A. No, not for a fact.

Q. And, in your prior deposition, you were asked whether or not a smell emanated from the back of that truck; is that correct?

MR. GILBERT: Objection, form.

THE COURT: Sustained as to form.

BY MR. KENNEDY:

Q. Your first impression, upon opening the truck, was that there were bales of something such as alfalfa or hay; isn't that true?

A. That's what I stated in my deposition.

Q. And that is true; is it not?

A. It smelled like some type of dried grass or something like that. [R. 70-72.]

cers to conduct a search by slitting open the black plastic trashbags in order to discover the marijuana * * *, no valid plain sight seizure of contraband from the [open] suitcase was ever accomplished and the search and seizure conducted therein was unreasonable." *Id.*

Similarly, respondents place untoward reliance on the officer's detection of an odor of dried grass or hay. The officer's failure to identify the odor as that of marijuana argues against probable cause, but even if he had been certain of the smell, he would not have been entitled to open the containers without a warrant. Respondents have not attempted to distinguish *United States* v. *Dien*, cited in our Petition, in which the court held that "[b]y placing the marihuana inside a plain cardboard box, sealing it with tape and placing it inside a van the windows of which had been painted over and in which plywood had been placed behind the drivers' seat, petitioners manifested an expectation that the contents would remain free from public examination. The fact that the agents detected the odor of marihuana emanating from the van did not alter this." 609 F.2d 1038, 1045 (2d Cir. 1979), *rehearing denied*, Nos. 79-1036, 79-1072, 79-1075; Nos. 1080-2 (2d Cir. Jan. 31, 1980).

2. The lower courts continue to be in confusion concerning the issues presented by this case.

Federal and state courts across the country continue to demonstrate their need for guidance in interpreting this Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979).[3] Very recently, for example, the United States

[3] Among the issues which continue to be in conflict is whether *Chadwick* and *Sanders* should be applied retroactively. The Sixth Circuit and the Texas Court of Criminal Appeals have joined the Second, Fifth, Seventh and Ninth Circuits in declining retroactive application. *See United States* v. *Calandrella*, 605 F.2d 236 (6th Cir.), *cert. denied*, 100 S.Ct. 522 (1979); *Brown* v. *State*, 594 S.W.2d 86 (Tex. Crim. App. 1980); *Nastu* v. *State*, 589 S.W.2d 434 (Tex. Crim. App. 1979); *Kemner* v. *State*, 589 S.W.2d 403 (Tex. Crim. App. 1979); *United States* v. *Reda*, 563 F.2d 510 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978); *United States* v. *Montgomery*, 558 F.2d 311 (5th Cir. 1977); *United States* v. *Berry*, 571 F.2d 2 (7th Cir. 1978), *cert. denied*, 439 U.S. 840 (1979); *United States* v. *Gallop*, 606 F.2d 836 (9th Cir. 1979); *United States* v. *Cornejo*, 598 F.2d 554 (9th Cir. 1979); *United States* v. *Stewart*, 595 F.2d 500 (9th Cir. 1979).

The Eighth Circuit and the Supreme Court of California, however, have rejected contentions that *Chadwick* should only be applied prospectively. *See United States* v. *Schleis*, 582 F.2d 1166 (8th Cir. 1978) (*en banc*); *People* v. *Minjares*, 24 Cal.3d 410, 591 P.2d 514, 153 Cal. Rptr. 224, *cert. denied*, 100 S.Ct. 181 (1979). The Second Circuit, meanwhile, has reiterated its view that *Sanders* did not make new law. *See United States* v. *Dien*, *supra*, slip op. at 5943. *But see State* v. *Kahlon*, No. A-4707-78 (N.J. Super Ct. App. Div. Feb. 13, 1980).

[4] A copy of the opinion is reprinted as the Appendix ("App.") to this memorandum.

[5] The warrantless seizure of the bags was felt by the majority to be justified by the same circumstances which allowed the warrantless search of the automobile from which the items were seized. App. 8a.

Court of Appeals for the District of Columbia Circuit, in deciding a case involving the suppression of evidence seized from a paper bag and a leather pouch, prefaced its analysis with the observation that "[t]he [Supreme] Court left us without detailed guidance concerning just what nonluggage containers require a warrant before being searched." *United States* v. *Ross*, No. 79-1624, slip op. at 9 (D.D.C. Apr. 17, 1980).[4]

The majority and dissenting opinions in the *Ross* case illustrate clearly that either this Court did not provide sufficient guidance to the lower courts, or some judges are badly misreading the *Chadwick* and *Sanders* opinions. Writing for the majority in *Ross*, Judge Tamm focused on defendant's reasonable expectation of privacy—specifically, whether it was reasonable to expect that the bag and pouch would remain unopened after their seizure by the police.[5] App. 8a. In reaching the conclusion that

"the fourth amendment does not protect any privacy interest in a closed but unsealed paper bag over and above the privacy justified by virtue of possession and control" (App. 9a), the majority considered several factors. These included " 'customs and values of the past and present,' " as well as "the precautions taken to preserve privacy,[6] the manner in which the paper bag was used, and the property rights in the bag at the time of the search." App. 13a-14a.

The leather pouch, on the other hand, was simply labelled as luggage, without the sort of analysis applied to the paper bag. App. 17a. On the basis of *Sanders*, the majority ordered suppression of the evidence secured from the pouch. App. 18a.

Judge Bazelon dissented from that part of the majority opinion which upheld the search of the paper bag. App. 19a. Quoting from *Sanders*, he noted that "[t]he Supreme Court has said in the clearest of terms that 'the extent to which the Fourth Amendment applies to containers and other parcels depends *not at all* upon whether they are seized from an automobile.' " (App. 20a; emphasis supplied by Judge Bazelon). He reasoned that since none of the other recognized exceptions to the warrant requirement could be applied, the majority was attempting to define a new exception under which the burden would be on the defendant to demonstrate that his possessions should be entitled to Fourth Amendment protection. App. 20a-21a.

Judge Bazelon criticized the majority for having read *Sanders* and *Chadwick* "as creating a 'luggage rule' rather than as limiting the 'automobile exception.' " App. 25a. He interpreted this Court's guidance to be that "the containers or parcels that do *not* deserve the full protec-

[6] The majority conceded that if the defendant had sealed the paper bag shut, a search warrant would have been required. App. 16a, n.6.

tion of the Fourth Amendment are those that display their contents by their nature." App. 28a.

Among the other courts which have recently rendered opinions involving warrantless searches of non-suitcase containers, some have applied the "expectation of privacy" rationale advocated by the *Ross* majority,[7] while others have taken the approach advocated by Judge Bazelon[8] in forbidding searches of containers which neither display their contents nor fit within one of the recognized exceptions to the warrant requirement. In addition, there have been cases in which the court's reasoning combined elements of both above-mentioned theories.[9]

The United States District Court for the Northern District of Texas, to give another example, discussed the relevant standards at length in granting a motion to suppress evidence (marijuana) obtained from opaque

[7] *See, e.g., Clark* v. *State*, 574 P.2d 1261 (Alas. 1978) (expectation of privacy in locked luggage "incomparably higher" than in paper bag); *Wyss* v. *State*, 262 Ark. 502, 558 S.W.2d 141 (1977) (toolbox not a repository of personal effects); *Ulesky* v. *State*, 379 So.2d 121 (Fla. Dist. Ct. App. 1979) (higher expectation of privacy in purse than in automobile); *Flynn* v. *State*, 374 So.2d 1041 (Fla. Dist. Ct. App. 1979) (no expectation of privacy for black plastic garbage bag); *State* v. *Marcum*, 24 Wash. App. 975, 601 P.2d 975 (1979) (reasonable expectation that athletic bag would be free from police intrusion).

[8] *See, e.g., Pomerantz* v. *State, supra*, 372 So.2d at 110 (unreasonable to slit open black plastic trashbags since no contraband in plain sight); *People* v. *Bayles*, 76 Ill.App. 3d 843, 395 N.E.2d 663 (1979) (contents of cloth whiskey bag not inferred from outward appearance); *Pirner* v. *State*, —— Md. App. ——, 411 A.2d 135 (Ct. Spec. App. 1980) (search of duffle bag unlawful in absence of special circumstances); *State* v. *DeLong*, 43 Or.App. 183, 602 P.2d 665 (1979) (where no other warrant exception applies, police may seize from auto closed container, such as camera case, with probable cause, but may search it only with warrant).

[9] We make no attempt here to list all of the recently reported cases interpreting *Chadwick* and *Sanders*. To illustrate the proliferation of such cases, we note that in January 1980 LEXIS listed 18 federal cases and 10 state cases citing *Sanders*. By the end of April 1980—three months later—there were 33 federal and 58 state cases listed.

polyethylene bags which were seized from several vehicles. *United States* v. *Rivera*, Crim. No. 3-79-190 (N.D. Tex. Jan. 11, 1980).[10] The court inquired "whether there is a reasonable expectation measured by society's expectation of government that sealed polyethylene bags with 'suspicious' contents may be opened without a warrant," but concluded that "[o]ne man's garbage bag is another man's luggage." *Id.* Recognizing that law enforcement officers are "most often given no guidance by these cases," the court suggested "an easily understood and administered standard—if the contents of a sealed package or parcel are not revealed by the package and you have exclusive control with no fear of harm from its contents—obtain a warrant." *Id.*

CONCLUSION

For the foregoing reasons, and for the reasons stated in his earlier Petition, petitioner respectfully urges the Court to grant a writ of certiorari and to reverse the decision below.

Respectfully submitted,

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[10] Undersigned counsel have been advised that the United States is appealing to the Fifth Circuit Court of Appeals the District Court's order granting the motion to suppress in the *Rivera* case.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1624

UNITED STATES OF AMERICA

v.

ALBERT ROSS, JR., APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. Criminal No. 78-698)

Argued December 7, 1979

Decided April 17, 1980

William J. Garber (appointed by this court) for appellant.

Bobara E. Liles, Assistant United States Attorney, with whom *Carl S. Rauh*, United States Attorney, *John A. Terry* and *Peter E. George*, Assistant United States Attorneys, were on the brief, for appellee.

Before BAZELON, *Senior Circuit Judge*, TAMM, *Circuit Judge*, and HAROLD H. GREENE,* *United States District Judge for the District of Columbia.*

Opinion for the court filed by *Circuit Judge* TAMM.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* BAZELON.

TAMM, *Circuit Judge*: With this case we must decide whether law enforcement officers must obtain a search warrant before opening a closed paper bag or a closed leather pouch lawfully seized from the trunk of an automobile that the officers have probable cause to believe contains narcotics. We conclude that under the circumstances of this case, the defendant did not have a reasonable expectation of privacy in the contents of the paper bag once the bag was in police hands; the warrantless search of the paper bag, therefore, was permissible. A pouch, however, is a form of luggage and the police must have a warrant to search such an item. Because the conviction of the defendant in this case rested on evidence obtained from both containers, we must reverse that conviction and remand for a new trial at which items taken from the paper bag, but not from the leather pouch, may be admitted.

I

On November 27, 1978, Detective Charles Marcum of the Metropolitan Police Department in Washington, D.C., received a telephone call from an informant who on prior occasions had provided reliable information about trafficking in narcotics that had led to seizures and arrests. The informant told Marcum that he had observed a man known as "Bandit" selling narcotics in front of 439 Ridge Street, N.W., in Washington. The informant reported

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

that the drugs were in the trunk of Bandit's automobile, a 1978 "purplish maroon" two-door Chevrolet Malibu with District of Columbia license plates. The informant also provided a detailed description of Bandit himself.

Detective Marcum, Detective David Cassidy, and Sergeant Raymon Gonzales drove to Ridge Street where they observed a car matching the informant's description. A radio check revealed that it was registered to an Albert Ross, Jr., who previously had used the alias of "Bandit." The police officers circled the block twice, then spotted the defendant driving the car. After stopping the vehicle and identifying themselves, the police asked Ross to step out of his car. Ross matched the description the informant had given Marcum. As Marcum conducted a body search, Gonzales observed a round of ammunition on the car's front seat. He looked for a pistol and found one in the glove compartment. Marcum arrested Ross and handcuffed him. Though the defendant offered evidence to the contrary, the police officers claim that Cassidy next searched the auto's trunk, where he found a closed but unsealed "lunch-type" brown paper bag and a closed red leather pouch or handbag. Cassidy opened the paper bag and discovered thirty glassine envelopes containing a white powder.[1] He left the bag and the pouch in the trunk, and the officers drove the car back to police headquarters. At the station, and still without having obtained a search warrant, Cassidy sent the glassine envelopes to the police laboratory for analysis.

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[1] Ross offered testimony that the officers did not open the paper bag until they returned to the police station. Inasmuch as our decision does not depend upon the existence of exigent circumstances to justify the warrantless searches in question, we need not decide whether the district court found that the police opened the paper bag at the time of arrest, as the officers testified. There is no dispute, however, that Detective Cassidy waited to open the red leather pouch until he returned to the police station.

He opened the red pouch and found $3,200 in currency; the laboratory later reported that the glassine envelopes contained heroin.

A federal grand jury in the District of Columbia indicted Ross on December 19, 1978, for possession of heroin, possession of heroin with intent to distribute, carrying a pistol without a license, and possessing a firearm after a felony conviction. Ross moved to suppress the evidence obtained from the search of the paper bag and the leather pouch. After an evidentiary hearing, the district judge denied the motion. A jury trial followed, and on March 21, 1979, Ross was convicted of possession of narcotics with intent to distribute, in violation of 21 U.S.C. § 841(a) (1976). Ross appeals his conviction.

II

Ross's initial argument is that the police lacked probable cause to stop and search his car. We disagree. Under *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), probable cause may be based on the information supplied by an informant if the informant was credible and he obtained his information in a reliable way. *See United States v. Davis*, Nos. 78-2246 & 78-2247, slip op. at 30 (D.C. Cir. Oct. 26, 1979). One method of discovering an informant's credibility, that is, his truthfulness, is to examine his "track record" in providing police with accurate information. *Id. See Aguilar v. Texas*, 378 U.S. at 114 n.5. Here, undisputed testimony indicates the officers knew that this informant had supplied accurate information on prior occasions. Moreover, there is no challenge to the method in which the informant came upon his information: he was an eyewitness to actual sales of narcotics. Under these circumstances, we believe it clear that the police had probable cause to stop Ross and to search his car.

III

Not only did the police have the necessary probable cause, but under *Carroll v. United States*, 267 U.S. 132 (1925), and *Chambers v. Maroney*, 399 U.S. 42 (1970), the officers lawfully could search Ross's automobile, including its trunk, without a warrant. *See United States v. Hawkins*, 595 F.2d 751, 753 (D.C. Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 910 (1979). Our only concern, then, is with the permissibility of the warrantless search of the containers they found in the trunk.

The fourth amendment dictates that "normally searches of private property [must] be performed pursuant to a search warrant issued in compliance with the Warrant Clause." *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979). A search warrant represents more than a formality or technicality. "The mere reasonableness of a search, assessed in light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." *Id. See United States v. Chadwick*, 433 U.S. 1, 8 (1977); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948). Moreover, the Supreme Court has stated clearly and emphatically that exceptions to the warrant requirement are rare, and that the few recognized exceptions must be "jealously and carefully drawn . . . ." *Jones v. United States*, 357 U.S. 493, 499 (1958). *See also United States v. Jeffers*, 342 U.S. 48, 51 (1951).

Analysis of fourth amendment protection begins with the person making claim to that protection. Fourth amendment rights are not intrinsic attributes of a container or any other object. Instead, "rights assured by the Fourth Amendment are personal rights . . . [that] may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons v. United States*, 390 U.S. 377, 389 (1968), *quoted in Rakas v. Illinois*, 439

U.S. 128, 138 (1978). *Accord, Alderman v. United States*, 394 U.S. 165, 174 (1969). The defendant must establish that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). *See id.* at 130 n.1.

To test whether the police officers' search of either the paper bag or the leather pouch invaded interests of Ross protected by the fourth amendment, we look to the expectation-of-privacy standard first enunciated in *Katz v. United States*, 389 U.S. 347 (1967), especially Justice Harlan's concurrence, *id.* at 360-62. *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Rakas v. Illinois*, 439 U.S. at 143. An interest is protected if two elements are present. First, as a subjective aspect, the defendant actually must have expected the preservation of his privacy. *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring). Thus if the accused intentionally displayed the contents of his automobile to the police, he obviously did not expect the contents to remain hidden from police view. *See id.* at 351 (majority opinion). Second, as an objective aspect, the defendant's expectation must be one that society is prepared to recognize as reasonable. That is, the defendant must have relied justifiably on a freedom from governmental intrusion. *Id.* at 361 (Harlan, J., concurring).

In most cases, the extent of expectation that is reasonable will depend upon the circumstances at the time of the search. The Supreme Court has taken several factors into account: the precautions taken to preserve privacy, the manner in which the person claiming fourth amendment protection has used the place or item searched, the treatment accorded that place or item at the time the Framers adopted the fourth amendment, and finally, the applicable property rights. *See Rakas v. Illinois*, 439 U.S. at 152-53 (Powell, J., concurring) (summarizing

earlier cases). For example, a lower expectation may be justified when the defendant no longer possesses the searched item. Both the majority and the dissent in *Rakas* acknowledged that "perhaps the Constitution provides some degree less protection for the personal freedom from unreasonable governmental intrusion when one does not have a possessory interest in the invaded private place." *Id.* at 166 (White, J., dissenting), *quoted with approval in id.* at 146-47 (majority opinion). Similarly, the Supreme Court has held in automobile cases that the characteristics of cars, the manner of their use, and the degree of their regulation dilute the justifiable expectation of privacy. *See Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). *Accord, Arkansas v. Sanders*, 442 U.S. 753, 761 (1979).

In this case, however, we are not dealing with the search of a car but with the search of two containers. Our inquiry must focus on the reasonable expectation of privacy Ross had in the paper bag and the leather pouch. The contents of some containers, those the Supreme Court refers to as "common repositor[ies] for personal effects," are entitled to an expectation of privacy regardless of their location or the right to possess them. *Arkansas v. Sanders*, 442 U.S. 753, 763-66 (1979). Luggage, such as a footlocker or a suitcase, "is *inevitably* associated with the expectation of privacy." *Id.* at 762 (emphasis added). Because society recognizes luggage as a personal sanctuary, its presence within a car or its having fallen lawfully into public hands does not alter the reasonableness of an expectation that it will not be opened by the police. *Id.*; *Rakas v. Illinois*, 439 U.S. 128, 154 n.2 (1978) (Powell, J., concurring). Professor Wayne LaFave has observed that "[i]n *Chadwick*, the Court was able to say that the 'substantial infringement with respondents' use and possession' of the footlocker, justified by exigent circumstances, 'did not diminish respondents'

legitimate expectation that the footlocker's contents would remain private.'" 2 W. LAFAVE, SEARCH AND SEIZURE § 5.5, at 365 (1978) (quoting *United States v. Chadwick*, 433 U.S. 1, 13 n.8 (1977)). *Accord, id.* § 5.5 (Supp. 1980) (analysis unaffected by *Sanders*). *Cf. Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (Court examines the legality of ordering the driver of a stopped vehicle out of his car by looking to the incremental invasion of privacy, given the stop).

The same circumstances that justified the search of Ross's automobile also justify a warrantless seizure of the paper bag and leather pouch, thereby depriving Ross of some of his possessory rights, at least temporarily. Our focus shifts to whether Ross reasonably could expect that after the bag and pouch were seized by the police, these containers nevertheless would remain unopened. In differentiating fourth amendment treatment of containers, parcels, and packages from that of personal luggage, the *Sanders* Court stated that although the need for a warrant to search nonluggage does not depend "upon whether they are seized from an automobile," [2] not all container types "deserve the full protection of the Fourth Amendment." *Arkansas v. Sanders*, 442 U.S. 753, 764 n.13 (1979). The Court left us without detailed guidance concerning just what nonluggage containers require a warrant before being searched. We must therefore determine whether a paper bag or a leather pouch may be searched immediately after their proper seizure, or if, like luggage, they may only be impounded until the police officers can obtain a warrant to search them. *See id.* at 772 (Blackmun, J., dissenting).

[2] Consequently, the police may not capitalize on a container's momentary presence in a vehicle as a pretext for searching the container without a warrant. In *Chadwick*, the Court disallowed the opening of a footlocker that the police had not attempted to search, although they had probable cause to do so, until the defendant stowed the footlocker in the trunk of a car. In *Sanders*, the police had probable cause to search Sanders' suitcase before it was placed in the taxicab trunk, *see* Arkansas v. Sanders, 442 U.S. 753, 766 (1979) (Burger, C.J., concurring in the judgment), but the police chose to wait. Nevertheless, although storing a container in a car does not suddenly strip the owner of his legitimate expectation of privacy in the container's contents, the presence of a container in an automobile may allow the police to discover and take possession of the container without a search warrant.

IV

We hold that absent unusual circumstances not present here, the fourth amendment does not forbid the police from opening a paper bag once it is properly in their hands. After analyzing the privacy expectation in a paper bag lawfully seized by police, we conclude that the fourth amendment does not protect any privacy interest in a closed but unsealed paper bag over and above the privacy justified by virtue of possession and control.

In traveling to this conclusion, we are fortunate that a portion of our path has been illuminated by the federal and the state courts that have already dealt with related situations. In general, invalidation of warrantless searches has been confined to the types of containers normally associated with personal luggage: a suitcase, a briefcase, a purse, a duffle bag, a backpack, a gym bag, a vinyl satchel, or a guitar case.[3] On the other hand,

[3] (1) *Suitcase*: United States v. Montano, 613 F.2d 147 (6th Cir. 1980) (per curiam); United States v. MacKay, 606 F.2d 264 (9th Cir. 1979); State v. Crutchfield, 123 Ariz. 570, 601 P.2d 333 (Ariz. Ct. App. 1979); Haughland v. State, 374 So. 2d 1026 (Fla. Dist. Ct. App. 1979); Buday v. State, 150 Ga. App. 686, 258 S.E.2d 318 (1979); State v. Gauldin, 44 N.C. App. 19, 259 S.E.2d 779 (1979); West Virginia v. Tomey, No. 14007 (W.Va. Oct. 16, 1979). *Cf.* United States v. Kralik, 611 F.2d 343 (10th Cir. 1979) (warrant to search car); State v. DeRusha, 74 Ill. App. 3d 641, 393 N.E.2d 619

(1979) (search permitted due to exigent circumstances); People v. Plantefaber, 91 Mich. App. 764, 283 N.W.2d 846 (1979) (exigent circumstances).

(2) *Briefcase*: United States v. Presler, 610 F.2d 1206 (4th Cir. 1979); Moran v. Morris, 478 F. Supp. 145 (C.D. Cal. 1979) (dictum); *In re* B.K.C., No. 13779 (D.C. Jan. 9, 1980); Webb v. State, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979); Araj v. State, 592 S.W.2d 603 (Tex. Crim. App. 1979). *Cf.* United States v. White, 607 F.2d 203 (7th Cir. 1979) (exigent circumstances); United States v. Calendrella, 605 F.2d 236 (6th Cir.) (*Chadwick* not applied retroactively), *cert. denied*, 100 S. Ct. 522 (1979); United States v. Garcia, 605 F.2d 349 (7th Cir. 1979) (search incident to arrest); State v. Daniel, 589 P.2d 408 (Alas. 1979) (inventory search, decision based on Alaska constitution).

(3) *Portfolio*: United States v. Miller, 608 F.2d 1089 (5th Cir. 1979).

(4) *Purse*: Ulesky v. State, 379 So.2d 121 (Fla. Dist. Ct. App. 1979).

(5) *Wallet*: *Cf.* State v. Hlady, No. 79-165-C-2, CA 14189 (Or. Dec. 31, 1979) (search permitted as being incident to arrest).

(6) *Duffle bag*: United States v. Johnson, 588 F.2d 147 (5th Cir. 1979).

(7) *Backpack*: United States v. Meier, 602 F.2d 253 (10th Cir. 1979).

(8) *Gym bag*: State v. Marcum, 24 Wash. App. 441, 601 P.2d 975 (1979). *Cf.* State v. Hassapelis, 404 A.2d 232 (Me. 1979) (harmless error).

(9) *Tote bag*: People v. Minjares, 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224, *cert. denied*, 100 S.Ct. 181 (1979).

(10) *Travel bag*: People v. Little, 598 P.2d 140 (Colo. 1979) (en banc).

(11) *Guitar case*: United States v. Bella, 605 F.2d 160 (5th Cir. 1979) (per curiam).

(12) *Camera case*: State v. DeLong, 43 Or. App. 183 (1979) (decided under combination of *Sanders* and Oregon precedent).

[Continued]

courts generally have found warrantless searches permissible when confronted with containers dissimilar to luggage: an integral part of an automobile, an open knapsack, a taped electric razor case, a toolbox, a closed but unsealed department store box, or a closed but unsealed envelope.[4]

[3] [Continued]

But see State v. Dalton, 24 Cal. 3d 850, 598 P.2d 467, 157 Cal. Rptr. 497 (1979) (closed metal box), *cert. denied*, 48 U.S.L.W. 3611 (U.S. Mar. 24, 1980).

Though in United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), the court held that a warrant was necessary to search three large cardboard boxes, the court predicated its conclusion on its findings that the use of plastic tape to seal the boxes and the secreting of the boxes behind covered windows "manifested an expectation that the contents would remain free from public examination." *Id.* at 1045.

[4] (1) *Integral part of the automobile*: United States v. Dall, 608 F.2d 910 (1st Cir. 1979) (camper cap).

(2) *Unlatched knapsack*: State v. Schrier, 283 N.W.2d 338 (Iowa 1979).

(3) *Closed satchel*: United States v. Milhollan, 599 F.2d 518 (3d Cir.), *cert. denied*, 100 S.Ct. 221 (1979) (three Justices would have granted the writ and reversed under *Sanders*).

(4) *Taped electric razor case*: Cooper v. Commonwealth, 577 S.W.2d 34 (Ky. Ct. App. 1979).

(5) *Closed but unlocked toolbox*: Wyss v. State, 262 Ark. 502, 558 S.W.2d 141 (1977).

(6) *Closed but unsealed department store box*: United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (inventory search permitted because boxes cannot be closed securely).

(7) *Envelopes*: United States v. Duckett, 583 F.2d 1309 (5th Cir. 1978).

(8) *Plastic bags*: United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Ficklin, Nos. 77-2923 & 77-3220 (9th Cir. Feb. 10, 1978) (memorandum) (plastic and burlap bags), *cert. denied*, 439 U.S. 925 (1978), *quoted in* United States v. Stevie, 582 F.2d 1175, 1179 n.4 (8th Cir.

Several courts have looked at paper bags in particular, and have concluded a search is permissible after their seizure. In *United States v. Andrews*, No. 79 Cr. 374 (MJL) (S.D.N.Y. Nov. 2, 1979), an undercover agent had seen a brown paper bag and a vial of clear liquid, taken from the bag, which had been identified as the "juice." Later, after surveillance, police arrested the driver of a car. While searching the car's trunk, the arresting officer observed a brown paper bag. Searching the paper bag, the officer found the vial previously shown to the undercover agent. Although citing *Arkansas v. Sanders*, the court denied a motion to suppress without discussing the warrantless search of the bag. In *Clark v. State*, 574 P.2d 1261 (Alas. 1978), a search of defendant's rental car uncovered a paper bag in the glove compartment. Still without a warrant, the police officer opened the bag and discovered it contained narcotics. Affirming Clark's conviction, the Alaska Supreme Court compared this case with *Chadwick* and concluded that the expectation of privacy was much lower in a paper bag's contents than in a footlocker's. Reaching the same conclusion, the court in *Webb v. State*, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979), noted that there are

> arguable differences between the reasonable expectation of privacy one might attach to a paper bag as opposed to a briefcase or luggage of some type. Whereas "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy," *Arkansas v.*

1978), *cert. denied*, 99 S.Ct. 3102 (1979); Flynn v. State, 374 So.2d 1041 (Fla. Dist. Ct. App. 1979).

(9) *Paper bags*: United States v. Vento, 533 F.2d 838 (3d Cir. 1976); United States v. Andrews, No. 78 Cr. 374 (MJL) (S.D.N.Y. Nov. 2, 1979) (approved without discussion although *Sanders* cited elsewhere in opinion); Clark v. State, 574 P.2d 1261 (Alas. 1978); Webb v. State, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979) (dictum).

> *Sanders*, supra, the same does not hold true to paper bags.

Id. at 403. Courts have also found the contents of opaque plastic bags, containers comparable to paper bags, to be entitled to a lesser expectation of privacy than personal luggage. *See United States v. Ficklin*, Nos. 77-2923 & 77-3320 (9th Cir. Feb. 10, 1978) (memorandum), *cert. denied*, 439 U.S. 825 (1978), *quoted in United States v. Stevie*, 582 F.2d 1175, 1179 n.4 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 3102 (1979); *Flynn v. State*, 374 So. 2d 1041 (Fla. Dist. Ct. App. 1979) (contrasting *Sanders*).

Recitation of precedent does not by itself determine whether Ross continued to have a reasonable expectation of privacy after his paper bag was lawfully seized by police. We must also rely on our own analysis of when a legitimate expectation of privacy attaches to a given container, so that absent exigent circumstances, a search requires a warrant. As the Supreme Court declared in *Rakas v. Illinois*, "it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary rule issues in criminal cases." 439 U.S. at 143 n.12. Instead, "[l]egitimation of expectation of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id. See Smith v. Maryland*, 442 U.S. 735 (1979) (society not prepared to recognize expectation of privacy in identity of telephone numbers called from another telephone). We therefore must decide what "sense of security" should exist in society, and we must do so at least in part by looking at "the customs and values of the past and present . . . ." *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting), *quoted in* 1 W. LaFave, Search

AND SEIZURE § 2.1, at 231 (1978). Other important considerations include the precautions taken to preserve privacy, the manner in which the paper bag was used, and the property rights in the bag at the time of the search. *See* pp. 6-7 *supra*. *See also* Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. Rev. 968, 983-84 (1968) ("The degree of privacy offered by structural characteristics, such as partitions or walls, is an important determinant of an area's character.").

If a paper bag were a form of luggage, our task would be a simple one: *Sanders* requires a warrant before searching any piece of luggage. Paper bags differ from personal luggage in two material respects, however. First, paper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands. *Cf. United States v. Neumann*, 585 F.2d 355 (8th Cir. 1978) (cardboard boxes not secure; inventory search justified).

Second, paper bags are not *inevitably* associated with the expectation of privacy. *See Arkansas v. Sanders*, 442 U.S. 752, 762 (1979). Although a paper bag *may* be pressed into service as a repository of personal effects, we do not believe a reasonable man would identify a paper bag as a normal place to entrust his intimate personal possessions. In contrast, luggage in general serves to carry clothes, toiletries, and other items associated with

day-to-day living. Luggage typically functions as a portable closet and chest of drawers; it follows that a person could justifiably maintain a substantially higher expectation of privacy in his personal luggage than in a paper bag.[5]

We therefore must decide whether, under the circumstances of this case, Ross had a reasonable expectation of privacy in the paper bag that the police discovered during the lawful search of the trunk of his car. The officers had reason to believe that the trunk was the warehouse for Ross's narcotics sales. Thus it was serving as more than simply a luggage compartment. When the police in searching the trunk came upon a paper bag, there was not indication that it was being used to carry intimate, private items. *See United States v. Dien*, 609 F.2d 1038 (2d Cir. 1979). *See generally United States ex rel. Cunningham v. Follette*, 397 F.2d 143, 145 (2d Cir. 1968), *cert. denied*, 393 U.S. 1058 (1969); *Walker v. United States*, 327 F.2d 597, 600 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 956 (1964).[6] No one disputes that they

[5] We do not, as the dissent suggests, create a rule that only luggage is protected by the fourth amendment. Because society always associates luggage with privacy, the fourth amendment must always protect it. This is not an intrinsic characteristic of the luggage but a legal application of society's manifested expectations—an extrinsic quality, so to speak. Because a paper bag is not a piece of luggage, however, we must undertake the more general inquiry of whether under the facts before us this particular container suggests an expectation of privacy. After examining those facts, we have concluded that Ross's paper bag did not connote such an expectation of privacy. Therefore, there was no privacy interest for the fourth amendment to protect.

[6] There was no evidence that Ross employed the paper bag as a substitute for luggage, nor do the facts and circumstances manifest any special expectation of privacy. If, for example, the police had found the paper bag amidst suitcases or other luggage, there would have been a stronger indication that the bag was pressed into service as a repository of personal

had the right to seize the bag to prevent the destruction of its contents, that is, the destruction of possible evidence. *See Arkansas v. Sanders*, 442 U.S. at 762; *United States v. Chadwick*, 433 U.S. 1, 13 (1978). Because a paper bag's general vulnerability suggests no reasonable expectation of privacy after its seizure, *see* p. 14 *supra*, and because the police justifiably believed that *this* paper bag was not being used to store personal items, the police lawfully could open it without violating Ross's fourth amendment rights.

In the final analysis, our determination of what "sense of security" should exist in society must be based upon general experience and judgment. The facts in this case lead us to conclude that Ross could not reasonably harbor an expectation of privacy in his paper bag beyond that existing due to actual possession, which is all that enables one to protect a paper bag's contents from public exposure. If, as the *Sanders* decision suggests, there are containers that the police, after a proper seizure, may open without a search warrant, Ross's bag must be among the best examples. Thus we agree with Professor LaFave that compared to the warrantless search of luggage, "when the [searched] effects are such things as coats and paper bags, the possessory interest and privacy interest are must less distinct, and it is thus far easier to conclude that the [privacy] interest is not protected by the Warrant Clause whenever exigent circumstances allow a warrantless intrusion upon the [possessory] interest." 2 W. LAFAVE, SEARCH AND SEIZURE § 5.5, at 365 (1978). *Accord, id.* § 5.5 (Supp. 1980) (analysis unaffected by *Sanders*).

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effects. Similarly, if Ross had sealed the paper bag shut, manifesting a special expectation of privacy, the intrusion of a search would have been more than negligible and a search warrant would have been required. In any situation approaching a borderline case, the police would best be cautious, and obtain a proper search warrant before proceeding.

V

With respect to Ross's red leather pouch, *Sanders* controls directly. *See* pp. 7, 14 *supra*. As a type of personal luggage, the pouch, in the words of *Sanders* itself, is a "common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979). Absent a valid warrant or one of the few recognized exceptions, any evidence secured from the leather pouch should be excluded when determining Ross's criminal culpability.

The Government attempts to bring the warrantless search of the leather pouch within the exception for searches incident to a lawful arrest. The attempt fails. Ross does not challenge a police search of his person or of any object associated with his person at the time of his arrest. *See United States v. Robinson*, 414 U.S. 218 (1973). When Detective Cassidy seized the pouch and later opened it at police headquarters, it was far from Ross's reach and in the exclusive control of the police. There was no danger Ross might gain access to the pouch and retrieve a weapon or destroy evidence. The police officers had no reason to believe that the pouch contained explosives or any other item that might prove hazardous to themselves or to the public. Ross's arrest cannot excuse a search made a substantial time later and a substantial distance away. *Preston v. United States*, 376 U.S. 364, 367 (1964). *See generally United States v. Chadwick*, 433 U.S. 1, 15 (1977); *Chimel v. California*, 395 U.S. 752, 763-64 (1969).

We hold that none of the "specifically established and well-delineated exceptions," *Katz v. United States*, 384 U.S. 347, 357 (1967), to the warrant requirement applied and that the police failed to follow "'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment . . . .'" *Osborn*

v. United States, 385 U.S. 323, 330 (1966) (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 272 (1960) (opinion of Brennan, J.) (equally divided Court)). The currency found in the red leather pouch should have been suppressed as evidence.[7]

VI

Because Ross's conviction rested in part on evidence that the police obtained through an unlawful search, the conviction is reversed and the case remanded for proceedings not inconsistent with this opinion.

It is so ordered.

[7] The Government's counsel conceded at oral argument that the $3,200 in currency found in the pouch was essential to the Government's charge of narcotics possession with intent to distribute, the only crime Ross was convicted of having committed. We are thus unable to excuse introduction of the evidence as harmless error. *See, e.g.*, United States v. James, 473 F.2d 115 (D.C. Cir. 1972).

BAZELON, *Senior Circuit Judge, concurring in part and dissenting in part*: This case involves the warrantless search of a zippered leather pouch and a closed paper bag seized from the trunk of an automobile. The majority holds that the search of the pouch was unconstitutional. I agree. However, the majority finds a constitutionally significant difference between the pouch and the paper bag. Based upon this "difference," it holds that the warrantless search of the bag was permissible. With all due respect, I think that this view stands the Fourth Amendment on its head, ignores the increased invasion of privacy that a search constitutes over a seizure, and disregards the teaching of the Supreme Court in this area. Fundamental principles of constitutional law require a warrant to justify the search of a paper bag in the circumstances of this case. I dissent from the majority's holding insofar as it upholds the warrantless search of appellant's bag.

I

The Fourth Amendment demands that "normally searches of private property be performed pursuant to a search warrant issued in compliance with the warrant clause."[1] Thus, it has long been clear that "searches conducted outside of the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[2] Each of these exceptions has been "jealously and carefully drawn."[3] Always, "the burden is on those seeking the exemption to show the need for it."[4]

[1] Arkansas v. Sanders, 99 S. Ct. 2586, 2590 (1979) (footnote omitted).

[2] Katz v. United States, 389 U.S. 347, 357 (1967).

[3] Jones v. United States, 357 U.S. 493, 498-99 (1958).

[4] United States v. Jeffers, 342 U.S. 48, 51 (1951). *See also* Katz v. United States, 389 U.S. 347, 357 (1967).

In the case at hand, the constitutionally mandated inquiry is whether the government has shown that the search of the bag fell within one of the few specifically established and well-delineated exceptions to the warrant requirement. The government has failed to make such a showing. First, this is not an "automobile exception" case.[5] The Supreme Court has said in the clearest of terms that "the extent to which the Fourth Amendment applies to containers and other parcels depends *not at all* upon whether they are seized from an automobile." [6] Therefore, the determination of the propriety of the search of the paper bag must be made without regard to its location in the automobile trunk.[7] Second, none of the other recognized exceptions to the warrant requirement applies. The officers did not obtain Ross' permission before searching the bag.[8] The government does not claim that exigent circumstances were present to justify the search.[9] The bag was not in an area within Ross' control at the time of his arrest.[10] And, the contents of the bag were not in plain view.[11]

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[5] *See* Carroll v. United States, 267 U.S. 132 (1925).

[6] Arkansas v. Sanders, 99 S. Ct. 2586, 2593-94 n.13 (1979) (emphasis added).

[7] The majority concedes as much. Majority Opinion at 7 ("In this case, however, we are not dealing with the search of a car but with the search of two containers.").

[8] *See* United States v. Watson, 423 U.S. 411 (1976).

[9] For example, the government does not allege that there was any fear on the part of the officers that the paper bag contained something that posed a danger to them or to others. If a reasonable apprehension of danger were justified, we would have a different case from the one at hand—one where a search might be proper.

[10] *See* Chimel v. California, 396 U.S. 72 (1969).

[11] *See* Harris v. United States, 390 U.S. 234 (1968).

Perhaps the majority is attempting to define some new exception to the warrant requirement. If so, however, its opinion does not make clear what the nature of this new exception might be. Moreover, it is settled that any new exception would have to be necessary to accommodate a vital societal interest, and its reach would be limited to just what is required for that accommodation.[12] Neither the court nor the government suggests that, in the circumstances of this case, the warrantless search of the paper bag was necessary to accommodate a societal interest.

It is undisputed that the bag was Ross' personal property, and that it was searched without a warrant. In the absence of a showing that this warrantless search fell within one of the exceptions to the warrant requirement, fundamental principles of constitutional law require the conclusion that the warrantless search of the bag was in violation of the Fourth Amendment.

II

My distinguished brethren give the foregoing exegesis of Fourth Amendment doctrine only a passing nod.[13] They would apparently dispense with these well-settled principles in favor of what can only be considered an entirely novel approach. Instead of requiring those seeking an exemption from the warrant requirement to show the need for one, the majority would ask the defendant in each case to demonstrate to the court's satisfaction that his personal possessions should be entitled to the protection of the Fourth Amendment.[14]

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[12] Mincey v. Arizona, 437 U.S. 385, 393 (1978); United States v. Chadwick, 433 U.S. 1, 15 (1977); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

[13] Majority Opinion at 5.

[14] Majority Opinion at 6.

This inversion of values is accomplished in the following manner. The court begins by acknowledging the fact that "the Supreme Court has stated clearly and emphatically that exceptions to the warrant requirement are rare." [15] Then, it embarks upon an analysis of recent Supreme Court decisions which wrenches those decisions from their context and transmutes them to render the warrant requirement totally irrelevant whenever a court perceives an insufficient privacy interest in a defendant's personal belongings.

Most prominently, the court today construes *Rakas v. Illinois* [16] and several other cases to support the proposition that even when the defendant is contesting a search of his own private property, he must demonstrate an independent privacy interest in order to invoke the protection of the Fourth Amendment.[17] However, the cases do not support that proposition. They are all standing cases. In such cases, the party seeking to assert a Fourth Amendment claim must show that his own rights have been abridged.[18] In each of the cases cited by the majority, a defendant sought to invoke the Fourth Amendment to suppress evidence obtained in a search of property with which he had no apparent relationship. Since *ownership* was not available to provide standing, the Court applied the "expectation-of-privacy" test first enun-

[15] Majority Opinion at 5.

[16] 439 U.S. 128 (1978).

[17] Majority Opinion at 6.

[18] The majority opinion quotes *Rakas* as requiring the defendant to establish that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Majority Opinion at 6. The three words "of the defendant" in the Supreme Court's opinion signify that Court's concern with whether the party seeking suppression was asserting an invasion of *his own* property or privacy.

ciated in *Katz v. United States* [19] to determine whether some basis independent of ownership existed to provide standing. In so doing, the Court did not cut back upon the traditional capacity of property owners to invoke the Fourth Amendment. Rather, it made clear that the *Katz* "expectation-of-privacy" test operates as an addendum to the traditional test of ownership, and it clarified the scope of the *Katz* test. Thus, for example, the *Rakas* Court said that Fourth Amendment protection may be conferred "*either* by reference to concepts of real or personal property law *or* to understandings [of the legitimate expectation of privacy] that are recognized and permitted by society."[20]

The language quoted by my colleagues cannot obscure the fact that, whatever else may be true about the scope of the Fourth Amendment, personal property is *presumptively* protected against warrantless searches.[21] After all, the Framers drafted the Amendment to safeguard

[19] 389 U.S. 347 (1967).

[20] 439 U.S. 128, 143-44 n.12 (1978) (emphasis added). At least four other times in the *Rakas* opinion, the Supreme Court makes the point that the warrant requirement applies *either* where personal property is involved *or* where a generally recognized expectation of privacy exists. *See, e.g.*, 439 U.S. at 134, 136, 142 n.11, 148.

[21] Katz v. United States, 389 U.S. 347, 357 (1967). *Compare* Majority Opinion at 5-6. The majority is apparently uncomfortable with the position it stakes out, for the its opinion is internally inconsistent on the question of whether property is presumptively protected. At one point, the opinion pronounces: "Fourth Amendment rights are not intrinsic attributes of a container or any other object." Majority Opinion at 5. At another point, it is said that "[t]he contents of some containers . . . are entitled to an expectation of privacy regardless of their location or the right to possess them." *Id.* at 7. Luggage, the majority concedes, is inevitably protected. *Id.* A warrant is always required before searching a piece of it. *Id.* at 14. Thus, it appears to be an "intrinsic attribute" of some types of containers that they are protected.

our citizens against unnecessary intrusions by governmental authorities into their personal lives.[22] And the plain language of the Amendment declares that the people will be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Katz* itself teaches that although the Amendment "protects individual privacy against certain kinds of governmental intrusion, . . . its protections go further, and often have nothing to do with privacy at all." [23]

The property interest defines a *core* of Fourth Amendment protection. This is available regardless of actual expectations, and notwithstanding judicial assessments of the adequacy of privacy-creating precautions. The privacy interest defines an *additional* zone of protection based upon the reasonable expectations of the actor. Most importantly, in either case, the presumption is that "searches conducted outside of the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.[24] The majority shifts that presumption by requiring the defendant to demonstrate that the searched property was associated with the expectation of privacy.[25] This confounds the Constitution.

III

Even if the validity of the search of the bag were to be judged solely by the "expectation-of-privacy" test, I would be forced to reject the answer proffered in the majority opinion.

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[22] Justice Frankfurter suggested that unwarranted searches by British authorities were one of the potent causes of the Revolution. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (dissenting).

[23] Katz v. United States, 389 U.S. 347, 350 (1967). *See also*, Spinelli v. United States, 393 U.S. 410, 412 n.2 (1969); Alderman v. United States, 394 U.S. 165, 176-80 (1969).

[24] Katz v. United States, 389 U.S. 347, 357 (1967).

[25] Majority Opinion at 6.

A.

In applying the "expectation-of-privacy" test, the court once again reads recent Supreme Court decisions to effect a dramatic shift in Fourth Amendment analysis. In particular, the inversion of values that characterizes the court's general approach to the Fourth Amendment is recapitulated in its discussion of the "automobile exception" cases, *United States v. Chadwick* [26] and *Arkansas v. Sanders*.[27] In each of these cases, the defendant sought to suppress evidence the police had obtained by searching a container found in the trunk of an automobile. In *Chadwick*, the container was a footlocker; in *Sanders*, a suitcase. First in *Chadwick*, and again in *Sanders*, the Court sought to clarify the scope of the "automobile exception" to the warrant requirement. In the clearest of language, it sought to limit that exception: the exception authorizes warrantless searches of automobiles—and nothing more. As the *Sanders* Court put it, "the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." [28] The Court underscored the impropriety of the searches before it by contrasting the expectation of privacy associated with the searched containers with the unique qualities of an automobile: luggage "is inevitably associated with the expectation of privacy." [29] But the majority turns these cases inside out by seizing upon this language and reading it as creating a "luggage rule" rather than as limiting the "automobile exception." Instead of applying *Chadwick* and *Sanders* to render irrelevant the presence of the brown bag in the trunk of Ross' car, the majority construes

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[26] 433 U.S. 1 (1976).

[27] 99 S. Ct. 2586 (1979).

[28] *Id.* at 2493-94 n.13.

[29] *Id.*

those cases as mandating an inquiry into whether or not a brown bag is luggage. Under this novel "luggage rule," if a defendant can establish that a container is "luggage," he "merits" the protection of the warrant requirement. If, however, a defendant is unable to establish the container is "luggage," the warrant requirement does not apply. To read *Chadwick* and *Sanders* in this way is to ignore—to subvert—the Court's effort to limit the "automobile exception." And, of course, such a rule turns the presumption of Fourth Amendment protection inside out.

The majority concedes that, were we dealing with a suitcase, the case would fall squarely within the Supreme Court's holding in *Arkansas v. Sanders*, and a search warrant would be required.[30] As the *Sanders* Court put it:

> Where—as in the present case—the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, the constitutional right of suspects to prior judicial review of searches will be fully protected.[31]

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[30] Majority Opinion at 7.

[31] 99 S. Ct. at 2594. It may be true that there is little doubt that a warrant would have been issued if sought. But this is irrelevant. As the Court put it in *Chadwick*:

> Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded.

433 U.S. at 15-16 (footnote omitted).

Of course, the containers seized by the police in this case were not suitcases. They were a red leather pouch and a closed brown bag. The majority extends the warrant requirement to the red leather pouch with a single dependent clause: "*As a type of personal luggage*, the pouch, in the words of *Sanders* itself, is a 'common repository of personal effects, and therefore is inevitably associated with the expectation of privacy.' "[32] No reasons are given to explain why a red leather pouch is "a type of personal luggage." But, whatever its reasons for calling the pouch "luggage," the majority refuses to extend the favor of that word to the closed brown paper bag.

The majority asserts that the *Sanders* Court "left us without detailed guidance concerning just what nonluggage containers require a warrant before being searched."[33] This is wrong. The *Sanders* Court provided guidance with the following language:

> Not all *containers* and *packages* found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some *containers* (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.[34]

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[32] Majority Opinion at 17 (emphasis added).

[33] Majority Opinion at 9.

[34] 99 S. Ct. at 2593-94 n.13 (emphasis added). We note specifically that the *Sanders* Court used the words "containers" and "parcels" and not the more restrictive word "luggage" to describe the class of items protected by the Warrant Clause. This is a clear indication that the Court viewed more than luggage—indeed that it viewed, as it said, even "parcels"—as protected by that Clause.

In short, the containers or parcels that do *not* deserve the full protection of the Fourth Amendment are those that display their contents by their nature. Clearly, the closed brown paper bag was not a container whose "contents can be inferred from [its] outward appearance." And its contents were not in plain view. Therefore, it did not fall within the exceptions to the warrant requirement expressly articulated by the *Sanders* Court.

Of course, the exceptions expressly articulated by the Court may not exhaust the list of possible exceptions. But given the presumption against exceptions to the warrant requirement, the paper bag must be considered a "container" or "parcel" to which full Fourth Amendment protections apply in the absence of some indication to the contrary. In holding otherwise, the majority makes the level of constitutional protection available to a citizen dependent on his ability to purchase a fancy repository for his belongings. This is an unacceptable standard. When a citizen takes the trouble to close a bag over his belongings, he manifests a privacy interest that deserves protection. The fact that the repository of personal effects is less expensive than a piece of luggage is of no import.

B.

To an extent, the majority's application of the "expectation-of-privacy" test proceeds independent of its novel "luggage rule." The paper bag is singled out for lesser protection by asserting that "a lower expectation of privacy may be justified when [a] defendant no longer possesses the searched item." [35] Applying this assumption

[35] Majority Opinion at 7. This provides an interesting postscript to the argument just analyzed. Significantly, the majority does not claim that a suitcase, once seized, loses the expectation of privacy associated with it. Nor does it claim that a red leather pouch, once seized, is less protected. Somehow, the "diminished expectation of privacy" that follows a seizure is reserved for paper bags.

here, the focus of the majority's inquiry becomes "whether Ross reasonably could expect that *after the bag* [was] seized by the police [it] nevertheless would remain unopened." [36] In the majority's view, he could not—and, thus, the fact of seizure is used to discount Ross' privacy interest in his private property.[37] This is painfully obvious bootstrapping. It is unsupported by precedent,[38] and it is contrary to the teachings of the Supreme Court.

Once again, *Sanders* and *Chadwick* are relevant. In *Sanders*, the Court took pains to note that the expectations of privacy that attends a container is not diminished "merely because [it] is to be carried in an automobile rather than transported by other means or temporarily checked or stored." [39] My brethren circumvent the rule of *Sanders* by inserting an extra step. The auto-

[36] Majority Opinion at 8 (emphasis added).

[37] The majority feels constrained to justify the *seizure* of the paper bag by reference to the automobile exception to the warrant requirement. Majority Opinion at 8. Since, by hypothesis, the majority views the Fourth Amendment and the "reasonable expectation of privacy" as co-extensive, this means that the majority concedes that there was an expectation of privacy about the bag *prior to* its seizure by the police. It is therefore incumbent upon the majority to demonstrate that the fact of seizure somehow dissipates the privacy interest appellant Ross had in the bag.

[38] The majority cites only Rakas v. Illinois as support for its position. Majority Opinion at 7. But the passage in *Rakas*, which appears in the dissent, says only that "*perhaps* the Constitution provides some degree less protection" when the defendant has *no* possessory interest in a *place* that is the subject of a search. Rakas v. Illinois, 439 U.S. 128, 166 (1978). In the case at hand, Ross maintained *some* possessory interest in the paper bag—even after it was seized. And, of course, we are dealing with Ross's *private property*, not a *place* owned by some third party.

[39] 99 S. Ct. 2586, 2593 (1979).

mobile exception is used to justify the seizure of the paper bag. Then, the seizure is used to reduce the expectation of privacy attending the paper bag, and thereby to justify the search. Through this legerdemain, the automobile is used to diminish the expectation of privacy associated with the paper bag—precisely the result forbidden by *Sanders*.

In *Chadwick* and again in *Sanders*, the Supreme Court examined the propriety of searches of containers that had been lawfully seized. Both times, the Court made the point that precisely because the containers had been seized—had been immobilized—a warrantless search was unnecessary and impermissible.[40] The police had control of the containers, the Court said, so there was no danger of anything untoward happening to the evidence while they waited to get a warrant. Moreover, a search involves a far greater intrusion into Fourth Amendment values than does impoundment. Thus, "the principle of lesser intrusion" would "mandate obtaining judicial permission before effectuation of the more intrusive search." [41] I respectfully submit that the court today ignores this clear teaching of the Supreme Court. The seizure of the paper bag does not justify a warrantless search—on the contrary, it forbids it.[42]

C.

The court's conclusion that Ross did not have a reasonable expectation of privacy in the contents of the bag once it was in police hands is, at bottom, based upon the

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[40] 99 S. St. at 2592-94; 433 U.S. at 13-16.

[41] United States v. Chadwick *And the Lesser Intrusion Concept: The Unreasonableness Of Being Reasonable,* 58 B.U. L. REV. 436, 466-67 (1978).

[42] The rule proposed by the majority would have the undesirable effect of encouraging seizures that might not otherwise occur, because the seizures would serve as the basis for otherwise impermissible searches.

unadorned notion that in the very nature of things: "It just *can't be* that a brown paper bag has an expectation of privacy about it!"

We are told first, that a paper bag offers "at best only minimal protection against accidental and deliberate intrusion;" it "can fall open or break very easily;" it can easily be invaded by the "curious or dishonest;" in short, a paper bag is "neither so secure nor so permanent as typical forms of luggage." [43] The majority finds this putative distinction constitutionally significant. But surely, the applicability of the warrant requirement cannot turn on whether a person carries his belongings in a frayed cloth suitcase or new American Tourister. Is the court saying that if Ross had used two or three paper bags inside one another, thereby rendering the contents more secure, the police would have been required to obtain a warrant prior to the search? The majority does concede that if Ross had taped the paper bag shut, a warrant would have been required.[44] Does this mean there is a constitutionally significant difference between taping a bag shut and closing it by folding it over? And, how is a taped bag any less fragile than an untaped one?

We are told, second, that the majority does "not believe a reasonable man would identify paper bags as a normal place to entrust his intimate personal belongings." [45] Can such speculation about what a "reasonable man" thinks about paper bags be attributable to anything but "acute ethnocentric myopia?" [46] The simple

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[43] Majority Opinion at 14.

[44] Majority Opinion at 15-16 n.6.

[45] Majority Opinion at 14.

[46] FCC v. Pacifica Foundation, 438 U.S. 726, 775 (1979) (Brennan, J., dissenting) (Majority approved an FCC ruling "channelling" the use of certain words to certain broadcast times; Justice Brennan noted that the proscribed words were the coin of expression in some of our subcultures).

fact is that in some of our subcultures paper bags are often used to carry intimate personal belongings. And, the sight of some of our less fortunate citizens carrying their belongings in brown paper bags is too familiar to permit such class biases to diminish protection of privacy. Moreover, there is no constitutional basis for saying that only repositories of "*intimate* personal belongings" [47] implicate privacy interests.

At bottom, the reason the majority refuses to extend the warrant requirement to the paper bag is its determination that in society's "general experience and judgment," the use of a bag does not provide its owner "a sense of security." [48] There can be no doubt that the *general* experience is that a great many people would see a paper bag as implicating privacy. It seems to me unduly presumptuous—and dangerous—to proffer a single understanding of the privacy associated by different kinds of people with different kinds of containers.

I reach a result different from the majority based not only upon my different understanding of "general experience and judgment," but also upon constitutional analysis. First, the constitution does not limit the protection of the warrant requirement to those items of personal property which "general experience and judgment" dictate require protection. The Fourth Amendment applies to all items of personal property.[49] Second, there is a strong presumption against *any* warrantless search of personal property.[50] And, third, under the standard enunciated by the Supreme Court in *Arkansas* v. *Sanders*, the containers involved in this case merit the protection of the warrant requirement. This is so even

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[47] Majority Opinion at 14.

[48] Majority Opinion at 16.

[50] *See* Part I *supra*.

[49] *See* Part II *supra*.

if the majority is correct in assuming that the existence *vel non* of Fourth Amendment protection turns on a linguistic analysis of the word "luggage" and its variations.

IV

While conceding that "recitation of precedent does not by itself determine whether Ross [had] a reasonable expectation of privacy," [51] the majority compiles an extensive list of cases tangentially related to the case at hand. The vast majority of the cases cited are clearly irrelevant. Most deal with containers which, even on the restrictive standard proposed in today's majority opinion, "merit" the protection of the warrant requirement. And many predate the Supreme Court's decision in *Arkansas* v. *Sanders*, a decision which did much to clarify the law in this area.

More important, the case law the majority cites to support the conclusion that a paper bag is not protected against a warrantless search, in fact, supports the opposite conclusion.[52] For example, in *People v. Marshall*, the California Supreme Court invalidated the warrantless search of a paper bag. Chief Justice Traynor wrote:

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[51] Majority Opinion at 13.

[52] Of the four cases cited by the majority involving paper bags, Majority Opinion at 12-13 and 12 n.4(9), two predated *Sanders*, United States v. Vento, 533 F.2d 838 (3d Cir. 1976); Clark v. United States, 574 P.2d 1261 (Alas. 1978), and the other two treated the propriety of the search of the paper bag only in *dictum*, United States v. Andrews, No. 78 Cr. 374 (MJL) (S.D.N.Y. No. 2, 1979); Webb v. State, 373 So.2d 400 (Fla. Dist. Ct. App. 1979). Indeed, one of the two cases that predated *Sanders*, Clark v. State was later limited by that court. State of Alaska v. Daniel, 589 P.2d 408 (Alaska 1979). *Daniel* explained that the search of the paper bag at issue in *Clark* was permitted because of exigent circumstances (the danger that the evidence would be destroyed). The *Daniel* court made clear that the *Clark* case was not decided on the issue of expectation of privacy.

> The fact that the container was only a brown paper bag instead of a packing box, purse, handbag, briefcase, hatbox, snuffbox, trunk, desk or chest of drawers . . . is immaterial. It is inherently impossible for the contents of a closed opaque container to be in plain view regardless of the size of the container or the material it is made of. A search of the container is necessary to disclose its contents. A search demands a search warrant.[53]

The Seventh Circuit has refused to approve the warrantless search of an "open" brown paper sack, the contents of which were not in the "plain view" of the officer before he seized the bag.[54] Other courts have reached similar results.[55] And, in *United States v. Dien*,[56] a unanimous panel of the Second Circuit disallowed the warrantless search of three large cardboard boxes; the court found the Supreme Court's decision in *Arkansas v. Sanders* controlling.[57]

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[53] 442 P.2d 665, 669 (1968).

[54] United States v. Griffith, 537 F.2d 900 (7th Cir. 1976).

[55] *See, e.g.*, North Carolina v. Francum (No. 7825 SC 773, C.A.N.C., January 16, 1979) (paper bag); State v. Brown, 557 P.2d 1052 (Sup. Ct. Arizona, 1976) (paper bag). *See also*, Liles v. State of Florida, 375 S. 2d 1094 (D.C. App. Fla. 1979) (vinyl satchel); People v. Boyles, 395 N.E. 2d 663 (Ill. App. Ct., 1979) (cloth drawstring bag).

[56] No. 79-1036 (2d Cir. Oct. 26, 1979).

[57] *Id.*, Slip Op. at 5245. The majority attempts to distinguish *Dien* on two grounds. Majority Opinion at 11 n.3. First, it asserts that the defendants in *Dien* manifested an expectation of privacy by secreting the boxes inside their van. But Ross had secreted his paper bag in his trunk. This leaves only the fact that the defendants in *Dien* had used plastic tape to seal the boxes to distinguish *Dien* from the case at hand. But this is not a rational ground for distinction. *See* Part III *supra* (discussing the significance of taping a paper bag). Additionally, it is quite possible that taping the boxes in *Dien* was necessary to accomplish the closing of the boxes. Ross had closed the bag by folding it over.

Finally, two recent cases in our own Circuit bear mention. In *United States* v. *Battle*,[58] the defendant challenged the warrantless search of a shopping bag he was carrying at the time of his arrest. The shopping bag was not searched until the defendant was at police headquarters. The court approved the search as incident to a lawful arrest because, under the rule of *Draper v. United States*,[59] a container which is within the immediate control of the defendant at the time of his arrest may be searched incident to his arrest even if the search is not contemporaneous with the arrest. Of course, no one contends that the *Draper* exception, which applies to all containers (suitcases as well as bags), governs the case before us. The paper bag was not in Ross' immediate control at the time of his arrest. To that extent, *Battle* is irrelevant. But, it is significant that the *Battle* court felt constrained to find an exception to the warrant requirement—the "search-incident-to-arrest" exception—sufficient to justify the search. By implication, therefore, the *Battle* court felt that the warrant requirement applied to the paper bag that was searched.

United States v. Brown [60] presented a situation where, as the arresting officers approached the defendant, he shoved or threw a small paper bag into a bush beside him. A search of the bag revealed narcotics. The defendant challenged the warrantless search as illegal. In discussing the merits of the defendant's claim, the majority and the dissent struggled with the question of whether the defendant had abandoned the paper bag—thus permitting a warrantless search. Neither the majority nor the dissent doubted that the Fourth Amendment extended to the paper bag.

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[58] 510 F.2d 776 (D.C.Cir. 1975) (Tamm, J.).

[59] 358 U.S. 307, 314 (1959).

[60] Nos. 77-2106 and 77-1646 (D.C. Cir. March 21, 1980).

CONCLUSION

The fatal flaw in the majority opinion is that, in examining the applicability of the Fourth Amendment to the search of the paper bag, it shifts the burden of demonstration from those seeking to justify the search to those seeking the protection of the warrant requirement. This unfortunately constitutionalizes a distinction between a red leather pouch and a paper bag that is necessarily based at least in some part on economic and class differences and perceptions.